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No.

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

JAMES DELL POTTER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit rendered in the above-entitled case on December 28, 1979. A timely filed Petition for Rehearing And Suggestion For Rehearing En Banc was denied on April 24, 1980.

CITATIONS TO OPINION BELOW

The unpublished Opinion of the United States Court of Appeals for the Ninth Circuit is set forth in the addendum to this Petition.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Ninth Circuit affirming Petitioner's conviction was entered December 28, 1979. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on April 24, 1980.

This Petition for Certiorari has been filed within thirty days of the denial of rehearing in accordance with Supreme Court Rule 22(2). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Where a physician is duly licensed and authorized to prescribe and distribute medications ("controlled substances") in connection with the practice of medicine and for a legitimate medical purpose, and where such controlled substances have been distributed under prescriptions to a small number of patients for treatment of specific medical complaints and ailments, may the prescribing physician be convicted of unlawful distribution of a controlled substance on the basis of disputed testimony that he had sexual relations with two patients, together with other disputed testimony that the physical examinations performed were "below standards of practice".

2. Where a physician is charged with the unlawful distribution of a controlled substance, and where the record clearly fails to present any evidence of wholesale unlawful distribution for profit, may the physician nevertheless be held accountable under 21 U.S.C. § 841.

3. Was Petitioner denied a fair trial where the trial court permitted extensive and disputed evidence that certain witnesses engaged in sexual relations with petitioner, where one witness was permitted to testify that she had previously

been treated by another physician who had been arrested for a similar offense, where the Court of Appeals acknowledged that the government's closing argument was improper, and where the Court of Appeals acknowledged that the jury was improperly instructed.

4. May extensive and admitted trial errors, including the admission of irrelevant and prejudicial testimony, improper closing arguments and an erroneous instruction, be disregarded on appeal based upon wholesale application of waiver and harmless error.

CONSTITUTIONAL AND STATUTORY PROVISIONS

21 U.S.C. § 841(a)(1):

> "(a) Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance; or . . ."

STATEMENT OF FACTS

Petitioner has been a licensed physician for the past twenty years with special emphasis on family practice. During the past ten years, including the period covered by the indictment in this case, he has maintained offices as a partner in the Henderson Clinic in Henderson, Nevada, and also at Sunrise Hospital and Rose De Lima Hospital, where he served as secretary, president elect, chief of staff and a member of the executive Board for a number of years. He also served on both the emergency room committee and the pharmacy committee where he coordinated, the nursing staff and the pharmacy with respect to the use, update and evaluating of new drugs at that hospital.

In 1977, Petitioner was indicted on 54 counts for the unlawful distribution of controlled substances. Each count of

the indictment pertained to a single prescription for a controlled substance written by Petitioner on behalf of five of his patients between January and November of 1977. That the 54 prescriptions had, in fact, been written by Petitioner was never disputed. Rather, the prosecution of this indictment centered on whether, as charged in the indictment, the medication in question was prescribed "not in the usual course of professional practice and . . . not for a legitimate medical purpose". On the basis of testimony of patients who received these prescriptions, and that of a physician testifying as an expert on the proper examination and treatment of patients, Petitioner was found guilty and sentenced to two years probation. Petitioner testified on his own behalf, disputing the "expert" testimony offered by the government as well as certain totally irrelevant and highly prejudicial testimony regarding sexual relations with patients.

Each patient who visited Petitioner's office for treatment paid all fees directly to Henderson Clinic. Generally, these fees ranged from $12.00 to $15.00 per visit. No evidence was presented showing that the fee charged was in any way graduated depending on the number of prescriptions written or the number of pills prescribed. No evidence was offered to show that the Petitioner prescribed quantities of controlled substances beyond any patient's personal needs or that the Petitioner received any form of "kick-back". In short, there was no evidence that Petitioner was attempting to "traffic" in drugs. The only "evidence" presented in this case concerned disputed testimony as to whether physical examinations of patients were sufficiently complete to warrant the prescription written by Petitioner in the course of his practice, and other testimony, reputed by defendant, that he had engaged in sexual relations with two of his patients. The jury in this case also heard testimony, over Petitioner's objection, that one of his patients had been

treated previously by another doctor who was subsequently arrested for a similar offense, although the evidence showed that the other physician was not even known to Petitioner. In addition, the government's closing argument (which the Court of Appeals admonished as having failed to conform to recognized standards of professional conduct; American Bar Association Standards, the Prosecution Function, § 5.8 Argument to the Jury), served to emphasize the alleged sexual relationship between Petitioner and certain of his patients and violated virtually every established rule circumscribing the proper scope or content of prosecutional argument. Finally, the Court instructed the jury in a manner which virtually invited conviction on the basis of such irrelevant and prejudicial evidence.

Briefly set forth below is a synopsis of the testimony offered by the government.

Gloria and Richard Kranjack.

Mr. and Mrs. Kranjack first became patients of Petitioner in February, 1977. Mrs. Kranjack visited Petitioner in February of 1977 complaining of insomnia, excessive weight gain and emotional problems as a result of marital difficulties. In treating Mrs. Kranjack between February and October of 1977, Petitioner wrote five prescriptions for methaqualone, one prescription for dexedrine and two for desoxyn, all of which are classified as Schedule II controlled substances under 21 U.S.C. § 812. Richard Kranjack, who first visited Petitioner in April of 1977 with similar complaints associated with insomnia and excessive weight gain, receved a total of ten prescriptions; six for methaqualone, two for dexedrine and the remaining two for desoxyn. Each prescription written for these patients was for not more than 30 dosage units for a thirty day period. There was no dispute that the medicines prescribed were effective in

treating these types of illnesses and are professionally recognized in treating symptoms of which the Kranjack's complained. Mrs. Kranjack could not say for sure whether or not she had received a physical examination on her initial visit. Although Petitioner wrote two prescriptions for Mr. Kranjack prior to seeing him based upon Mrs. Kranjack's description of his symptoms, he was subsequently given a complete physical in April of 1977 when he first visited Petitioner.

Dawn Marie Campbell.

Dawn Marie Campbell is a professional dancer who visited Petitioner's office in March of 1977 for treatment of bronchitis, insomnia, and excessive weight gain. In treating the bronchial condition, Petitioner prescribed penicillin. Initially, Petitioner wrote two prescriptions for methaqualone to aid Miss Campbell in sleeping. These prescriptions were of 30 dosage units each; one was written in the name of Dawn Dampbell and the other in the name of Marie Campbell. Petitioner testified that it is his practice to prescribe not more than 30 dosage units at one time for any medicine and that pharmacists in the area were aware of this. But Petitioner believed that Miss Campbell's sleeplessness was due in a large part to her bronchial condition, which necessitated her taking two methaqualone before she went to bed, he wrote two separate prescriptions at one time. Between March and October, Miss Campbell received 15 prescriptions for methaqualone.

Miss Campbell further stated that she was 20 pounds overweight when she first visited Petitioner. As a dancer, she needed to reduce. To help her control her weight, Petitioner prescribed preludin and eskatrol not only to assist in weight control but also to relieve the extra respiratory effort occasioned by excessive weight gain. It was not disputed that Miss Campbell received a thorough and com-

plete physical examination. It was also established that the treatment plan prescribed by Petitioner was successful in relieving the bronchitis, insomnia and weight gain.

Sheri Cosner.

Sheri Cosner is a prostitute who first visited Petitioner in 1975. Miss Cosner received treatment for a huge blood collection in her foot, a sprained ankle, insomnia and also sought counseling for psychological and emotional support. Miss Cosner visited Petitioner's office 15 times before ever receiving a prescription for methaqualone. Between January and October 1977, Miss Cosner received ten prescriptions for methaqualone of 30 dosage units each to treat a claimed insomniac condition which Miss Cosner admitted on cross-examination was a fabrication. Petitioner stated that he did not know Miss Cosner was not actually suffering from insomnia. Petitioner stated that he was aware that Miss Cosner had seen a number of psychiatrists who had all prescribed medications with adverse side effects. He stated further that he believed the methaqualone had a very beneficial effect in enabling Miss Cosner to relate to reality. In addition, Miss Cosner received prescriptions for dexamil to calm and control her without the usual side effects associated with dexedrine (nervousness and excitability).

Karen Ribeiro.

Karen Rebeiro was, at the time of trial, employed by the Division of Investigation on Narcotics, a Nevada state agency. She testified that she conducted investigations into improper prescription practices on the part of physicians, and that in this connection, she often worked under an alias name in an undercover capacity. In the instant case, she presented herself to Dr. Potter as a new patient using the name Michelle Bogart.

Ms. Rebeiro testified that she received prescriptions from the defendant on three occasions, August 13, 1977, August 26, 1977 and October 13, 1977. She received a total of seven prescriptions, three for methaqualone, three for dexedrine and one for preludin. Ms. Rebeiro testified that, when she first went to Dr. Potter's office, her blood pressure and pulse were taken, and she was asked if she had any allergies. The defendant then conducted a physical examination, checking her eyes, nose, ears and with a stethoscope, checked her lungs. She testified, that until then, she had expressed no need for medication. She then asked for some dexedrine and, according to agent Rebeiro, the Petitioner asked if she had ever had dexedrine before. She said she took them quite frequently, that she was a dancer at the Tropicana, and took one right before the show because they gave her a lot of "pep".

As did the other witnesses, Ms. Rebeiro testified that the fee paid to the clinic receptionist was not based upon the prescription that was written. She paid the same fee as the other witnesses; $24.00 for the first visit and $12.00 to $15.00 for subsequent visits.

Ms. Rebeiro could not recall whether, in taking her history, the nurse had asked whether she had any complaints. She stated that when she first visited the defendant, she represented to him that she had been taking dexedrine to aid her in doing her job as a dancer, and that she intended to convey the impression that she did not feel she was able to do her job as a dancer as well without the assistance of dexedrine. She confirmed that she never gave any money directly to Dr. Potter, and that it was her understanding that she was paying Henderson Clinic, a group of doctors practicing together.

Essentially, Ms. Rebeiro testified that she did not have difficulty obtaining the desired prescriptions from the defendant, that he did not perform a thorough physical on each of the three occasions she visited him, that she once indicated that her boyfriend was also using her medication, and that the defendant had indicated a concern that physicians were being investigated for over-writing controlled substance prescriptions. Portions of her testimony were disputed by the defendant.

Dr. Ellenhorn.

Dr. Ellenhorn, the government's expert, testified that methaqualone was a sedative and that dexedrine was prescribed for the purpose of weight control. He offered the opinion that it was *"below standards of practice"* to prescribe such medication without first seeing the patient. In response to a lengthy hypothetical question by the Government, Dr. Ellenhorn testified that the hypothetical facts did not evidence a *good faith medical examination,* and did not evidence that a determination had been made of a specific pathology. Significantly, however, Dr. Ellenhorn expressed no opinion regarding whether the prescribing of methaqualone, dexedrine or desoxyn for Mrs. Kranjack was for a purpose other than a legitimate medical purpose and outside the course of the defendant's professional medical practice. With respect to Mr. Kranjack, he testified that the prescribing of medication before the patient had been seen was *"below the standards* of care" and that "initially" those prescriptions were not for a legitimate medical purpose.

Testimony of Petitioner's Sexual Relationships And Testimony Relating to Dr. Russell.

Dawn Marie Campbell and Sheri Cosner both testified that in the course of Petitioner's treatment of their illnesses,

Petitioner engaged in certain sexual acts with them in Petitioner's office. These allegations, however, were flatly denied by Petitioner on direct and cross-examination. To rebutt this testimony, the government called as a witness Miss Robin Quelch, a prostitute, who stated that in 1975, she had performed certain sexual acts with Petitioner in his office. Her testimony was strictly confined to this allegation. The government argued that this testimony was relevant evidence in that it tended to establish the Petitioner's motive in writing a prescription for a controlled substance outside the legitimate medical purpose for which such prescriptions could be written. Although counsel for Petitioner objected at the time such testimony was elicited from Sheri Cosner on the ground that this testimony was irrelevant to the issues raised by the indictment and served only to prejudice the jury, the objection was overruled. There is no question (as the Court of Appeals conceded) that the trial court failed to balance any possible relevancy of this testimony against its potential and real prejudicial effect on the Petitioner's right to a fair trial.

In regard to Dr. Russell, counsel for Petitioner objected to the government's reference to a physician who had been arrested on a similar charge. The reference came about in the testimony of Dawn Campbell who stated that she had seen another doctor prior to seeing Petitioner. In response to leading questions by the government's counsel she testified that the previous doctor was Dr. Russell and she testified in the affirmative to the question: "Is that the same Dr. Russell who was arrested?"

Contrary to the government's claim on appeal, the evidence of sexual relations did not show Petitioner's "motive" in writing the prescriptions. Dawn Marie Campbell was asked on cross-examination if the writing of a prescription was ever conditioned on the granting of sexual favors. Her

response was an unequivocable "no". Moreover, even if such "evidence" of sexual relations could be considered remotely relevant, no effort was made to balance its relevancy against the severe prejudicial impact on the jury, as required under Rule 403 of the Federal Rules of Evidence.

With respect to Dr. Russell, no evidence was presented to establish that Petitioner even knew Dr. Russell. No evidence was presented that Dr. Russell was ever convicted of the charges against him. Dr. Russell was not even alive at the time this case was tried. The only purpose and the clear objective of the government in mentioning the fact of his arrest was to establish one and only one meaning; guilt by association. This fact was as much as admitted by the Appellate Court which erroneously ruled that the issue had been waived by failure to object to the government's line of questioning in this regard. Not only had counsel objected, the Court again erred in failing to address the prejudicial impact of such an obvious ploy to bias the jury.

The impact of that unfairly prejudicial evidence was intentionally exacerbated by the Government's closing remarks. In addition, the Government's final argument was riddled with expressions of the prosecutor's personal belief concerning both the ultimate issue of guilt or innocence, and the credibility of the defendant and other witnesses called at trial, implying at times knowledge of facts which were not before the jury. Inflammatory remarks regarding the defendant, and wholly improper attacks upon his character, further served to create the "bad person" image which was obviously the design of a summation carefully calculated to appeal to the emotion and bias of the jury. Finally, the prosecutor referred during closing argument to the defendant's failure to call certain witnesses and produce certain documents in support of his testimony, when there was absolutely no indication that such witnesses and docu-

ments were not equally available to the Government for presentation during his case in rebuttal, thus shifting the burden of proof to the Petitioner.

Finally, the Court, *sua sponte,* instructed the jury that:

> "The defendant is not on trial for any act or conduct of his that is not charged in the indictment. The defendant is not on trial for having sexual relations with patients. *You should consider the evidence of sexual relations, if you believe it took place, only to determine whether or not the defendant is guilty of the unlawful distribution of controlled substances as charged in the indictment.*" (emphasis added).

REASONS FOR GRANTING WRIT OF CERTIORARI

It would be less than candid for Petitioner to suggest that in his personal view, a stronger reason exists for granting this Petition than the vindication of his fundamental rights to a fair trial and a just appeal, both of which have been denied. The trial errors were substantial, both in number and in gravity; several were even acknowledged by the Court of Appeals in an opinion which otherwise failed to address certain issues, predicated its holding upon findings unsupported by the record, and applied theories of harmless error, waiver and estoppel to those trial errors which otherwise could not be ignored.

It is recognized, however, that a Writ of Certiorari is itself an extraordinary remedy, normally requiring that the issues presented possess a significance beyond the immediate case. Such substantial and important issues clearly are involved here. First, the circumstances of this case were not those contemplated by Congress in subjecting physicians to criminal liability under 21 U.S.C. § 841(a). The statute is designed to proscribe the wholesale distribution of controlled substances for profit. To the extent that the

statute is applicable to physicians registered to prescribe such medications, it obviously is intended to be applied to the wholesale criminal abuse of that privilege, i.e., trafficking in drugs, not the care of patients. If the statute may be applied to the facts of this case, it may be applied in any instance. The Government need only claim that the examination and treatment procedures employed were "below standard" in order to subject a physician to the threat of criminal liability. This specter represents nothing less than an Orwellian intrusion into the most confidential of relationship, that of physician and patient.

Secondly, to render a physician accountable *for unlawful distribution* on the basis of totally irrelevant, prejudicial and disputed testimony concerning sexual misconduct with patients renders the physician totally defenseless, for there is no conceivable method of disproving such claims when the alleged conduct is confined to the privacy of an examination room. The physician is literally at the mercy of the veracity of his patients.

Noticeably absent from this record are the traditional indicia of bad faith medical practice in prescribing controlled substances; the distribution of pills to individual patients in such vast quantities that it may be inferred that the patient is acting as a "middle-man" for the unlawful distribution to others, pharmacy kick-backs, uncommonly large numbers of prescriptions, graduated fees based upon the number of prescriptions written and/or quantity of pills prescribed, and the like. What this case establishes, if Petitioner's conviction is allowed to stand, is the extent to which the government may question the exercise of medical discretion in treating illnesses through the authorized prescription of controlled substances. The issue cannot be dismissed, as did the Court of Appeals, in reliance upon waiver, harmless error, curative instructions and procedural

excuses; the issues presented affect significantly the practices of an entire profession.

The evidence in this case clearly established that the medication prescribed by Petitioner met with successful results where the illness was not feigned.* Even the government's expert, Dr. Ellenhorn, was not willing to conclude to a reasonable degree of medical certainty that these treatments were outside the legitimate practice of medicine.

The statute which is the basis of this conviction should not be utilized to restrict the authorized practice of medicine, absent clear proof of criminal activity in dispensing controlled substances. Any such unfettered intrusion will severely impact upon the very nature of the physician-patient relationship, a fact meriting this Court's urgent attention. A physician authorized to dispense a controlled substance should not require the presence of his attorney in the examining room; nor should the government, armed with the power to indict, become a third-party consultant.

I.

21 U.S.C. § 841 WAS NEVER INTENDED TO APPLY TO THE PRESCRIPTION OF MEDICATION IN THE ACTUAL TREATMENT OF PATIENTS.

The instant case provides a dangerous and unwarranted precedent in the prosecution of physicians who, in the course of their medical practice, dispense controlled substances through the issuance of prescriptions. In *United States* v. *Moore*, 423 U.S. 122 (1975), this Court upheld the applicability of 21 U.S.C. § 841 to physicians who are authorized

* With respect to Sheri Cosner, it is undisputed that she falsely stated to Petitioner that she was suffering from insomnia. Agent Rebeiro could not recall whether any specific complaints or illnesses were related to Petitioner's nurse.

to dispense controlled substances. In doing so, this Court recognized a Congressional concern that the illegal flow of drugs should be prohibited when drugs are diverted from legitimate channels. In the case of Dr. Moore, there was substantial evidence to support this Court's conclusion that *Moore* acted as a large-scale "pusher". *United States* v. *Moore*, 423 U.S. at 143.

In the instant case, extraordinary dosages of the subject medications were never prescribed. Although Petitioner sometimes wrote two prescriptions for the same patient, he did so only to allow the patient to obtain a monthly dosage sufficient for that patient's particular needs. No evidence was presented in this case that Petitioner reaped *any* profit based upon the number of prescriptions written or the number of pills prescribed. In fact, all payments were made to the Henderson Clinic. All payments were in the amount of the pre-set examination and consultation fee. Significantly, that fee was charged regardless of whether medication was prescribed.

Petitioner recognizes the legitimate concern of Congress and this Court in applying § 841 to physicians who, although registered, prescribe controlled substances for other than a legitimate medical purpose. However, as this Court noted in *Moore, supra,* penalties under § 841 are designed to address criminal abuse—"pushing" drugs—not the practice of medicine. More specifically, this Court commented on the legislative history of the Controlled Substances Act:

> "The House Committee Report on the bill that was to become the CSA explains: 'The bill provides control . . . of problems related to drug abuse through registration of manufacturers, wholesalers, retailers, and all others in the legitimate distribution chain, and makes transactions outside the legitimate distribution chain illegal.' H.R. Rep. No. 91-1444, p. 3. Although this language is

> ambiguous, the most sensible interpretation is that the penalty to be imposed for a violation was intended to turn on whether the 'transaction' falls within or without legitimate channels. All persons who engage in legitimate transactions must be registered and are subject to penalties under §§ 842 and 843 for '[m]ore or less technical violations.' H.R. Rep. No. 91-144, p. 10. But 'severe criminal penalties' were imposed on those, like respondent, who sold drugs, not for legitimate purposes, but primarily for the profits to be derived therefrom.' Ibid."

That this approach has been followed in some Circuits is seen in such cases as *United States* v. *Jackson*, 576 F.2d 46 (5th Cir. 1978); and *United States* v. *Ellzey*, 527 F.2d 1306 (6th Cir. 1976), where the evidence of "street pusher" practices was clear. No such proof was offered against Dr. Potter.

Petitioner requests that this Court define the spectrum of activities which the government may properly question in prosecutions against physicians under § 841, to avoid wholesale governmental intrusion into the physician-patient relationship. As a family practitioner, Petitioner respectfully submits that the failure to do so will result in further prosecutions of this nature, having no genuine bearing on the issue of good faith medical practice, and serving only to restrict and inhibit the necessary trust, freedom and confidence between a doctor and his patient.

II.

PETITIONER WAS DENIED A FAIR TRIAL AND APPEAL.

The Court of Appeals decision and opinion predicates the affirmance of Dr. Potter's conviction on a misapprehension of the record and the misapplication of established principles of law. It is respectfully submitted that the decision, if allowed to stand, represents a most dangerous precedent

in terms of the fundamental right of every person to a fair trial. If allowed to stand, the Court of Appeals decision will provide authority for wholesale utilization of totally irrelevant and unfairly prejudicial evidence in criminal cases will invite proof of guilt by association, will totally undermine the value of accurate jury instructions, and will provide carte blanche authority to prosecutors to disregard carefully established and vitally important rules defining the propriety of closing arguments.

In an effort to justify the use of certain evidence of sexual misconduct—evidence which had nothing to do with the offense charged (unlawful distribution of controlled substances)— the Court of Appeals states that "the jury could properly infer that the granting of sexual favors provided at least some incentive for his [the defendant's] actions". That inference is *not* permissible because the *government's witnesses* specifically denied that they were asked or required to engage in sexual conduct with the defendant in order to obtain the prescriptions. To suggest that such an inference is permissible, in the absence of direct and unrefuted evidence to the contrary presented through the *government's* witnesses, is to deny the defendant an effective appeal.

Attempting to demonstrate that the trial court had actually made a determination that the evidence was not unduly prejudicial, the Court of Appeals opinion points to the single instance in the record where the District Court considered the evidence of sexual misconduct, and states that "the trial judge expressly ruled at a bench conference . . . that the testimony was relevant, even though it did not expressly articulate the balancing test [of Rule 403, F. Rules of Civil.]". That, of course, is precisely the point. The District Court did no more than determine (we submit,

erroneously) that the challenged evidence was *relevant*. The balancing test is required by Rule 403 of the Federal Rules of Evidence and by numerous judicial decisions. The trial court did not determine at all whether the probative value of that evidence outweighed the danger of unfair prejudice. This Court of Appeals opinion now stands for the proposition that a threshold determination of relevancy is sufficient to render evidence admissible without recourse to the fairness considerations which Rule 403 was designed to preserve and foster.

In addition, particularly considering the consequences of such a conviction to a physician and his future ability to practice his profession, the opinion of the Court of Appeals is fundamentally unfair. The Court reaches to find relevancy from inferences that are contradicted by substantive direct evidence. The Court determines in one sentence that the danger of unfair prejudice does not outweigh the probative value of the evidence, but states in its lengthy opinion not a single fact or reason to support that conclusion. Certainly the evidence was inflammatory and, just as certainly, it was in no way critical to the government's case. The Court further supports affirmance in this case by finding, in a remarkable number of instances, that certain errors did not constitute "plain error", by ruling that the Petitioner's trial counsel "waived" certain errors at trial by failing repeatedly to object, by finding that an admittedly erroneous instruction was "cured" by other instructions, and by utilizing other insubstantial bases for disregarding errors which would otherwise warrant a new trial.

The most glaring example of this approach, however, is seen in the Court's treatment of the government's closing argument. As more fully discussed, certain of the errors raised with respect to the prosecutor's closing argument were not even discussed by the Court. Those that were dis-

cussed were found, for the most part, to have been improper, a not too difficult conclusion given that the government's closing argument in this case violated virtually every rule proscribing improper prosecutorial remarks in the presence of ε jury. In a footnote (p. 19) the Court states that "we again admonish government counsel, as we did in *United States* v. *Mikka, supra,* 586 F.2d at 155, n. 6 and cases there cited, to observe recognized standards in their closing argument." Petitioner respectfully submits that the time has come to do more than "admonish" the government; as the closing argument in this case evidences, such admonitions are totally disregarded by government counsel where the prosecutor deems it necessary to inflame the jury in order to obtain a conviction. That this is the appropriate case to define standards of conduct in this area is seen in the host of ways in which the government's argument was improper. An opinion more carefully considering each of the aspects of the government's closing argument would serve as a virtual primer on that area of the law.

In the final analysis, appellant was denied a fair trial and, with all due respect, a fair appeal. He was convicted on the basis of irrelevant and extremely prejudicial evidence, guilt by association, the use of an admittedly erroneous instruction, and a closing argument fraught with improprieties that should not be tolerated by any court. It is fundamentally unfair to affirm such a conviction on the basis of such convenient bromides as waiver, harmless error, curing instructions and the like.

CONCLUSION

The prosecution of Petitioner under the facts of this case, together with the decision of the Court of Appeals, have created uncertainty in an area of the law impacting upon the medical profession generally and the physician-patient relationship, in particular. Unless resolved—unless the parameters of 21 U.S.C. § 841 and this Court's decision in *U.S.* v. *Moore*, 423 U.S. 122, are defined—the decision of the Court of Appeals will stand as a threat to the ability of any physician to treat patients with the confidence and freedom essential to proper medical care, and will expose an entire class of persons to criminal liability beyond the intent of Congress in enacting 21 U.S.C. § 841.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 78-3568

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAMES DELL POTTER,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Nevada

Before: WRIGHT and TANG, Circuit Judges and
JAMESON,* District Judge.

JAMESON, District Judge.

OPINION

A jury found appellant, James Dell Potter, a Nevada physician, guilty on 54 counts of unlawfully distributing controlled substances in volation of 21 U.S.C. § 841(a)(1).[1] We affirm the judgment of conviction.

Factual Background

Appellant is licensed to pratice medicine in the State of Nevada and at the time of trial was registered with the

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* The Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

[1] § 841(a) provides that "it shall be unlawful for any person knowingly or intentionally . . . to distribute, or dispense, or possess with intent to . . . distribute, or dispense, a controlled substance. . . ."

"[B]y creating the means by which controlled substances can be transferred, a doctor 'distributes' within the meaning of 21 U.S.C. § 841(a) by the act of writing a prescription outside the usual course of professional practice and not for a legitimate medical purpose." *United States* v. *Davis*, 564 F.2d 840, 845 (9 Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978).

Drug Enforcement Administration to prescribe and dispense controlled substances for legitimate medical purposes. In a 54 count indictment he was charged with prescribing controlled substances for five persons, "not in the usual course of professional practice" and "not for a legitimate medical purpose". The testimony of these five persons, including an employee of the Nevada Division of Investigation and Narcotics, provided the factual basis for the Government's case.

Gloria Kranjack, a cocktail waitress, testified that she first visited Dr. Potter's office in February, 1977, to obtain a prescription for quaalude, a controlled substance.[2] She told Potter that she needed the drug to help her sleep. She also requested a prescription of quaalude for her husband and a prescription of dexedrine, another controlled substance,[3] for herself. Dr. Potter provided the prescriptions. With little or no medical examination,[4] he refilled the prescriptions on several subsequent visits through October, 1977.

Dawn Marie Campbell, a 22 year old dancer, visited the doctor initially in March, 1977, to obtain a prescription for quaalude and to be treated for a bronchial condition. After

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[2] The Government's expert witness, Matthew J. Ellenhorn, M.D. testified that methaqualone, or "quaalude", is a depressant with a potential for psychological and physical dependency, and which, if taken excessively, can be lethal.

[3] The Government's expert testified that dexedrine is an amphetamine which is used solely in dietary treatment of obesity. It is a stimulant.

[4] Gloria Kranjack testified that Dr. Potter did not at any time examine her, take her medical history, or question her concerning her use of the drugs. Her husband, Richard, first visited Potter after twice receiving prescriptions. Although Potter conducted a physical examination and took Kranjack's medical history, he made no inquiry concerning Kranjack's medical need for the drugs.

giving her a medical examination, Dr. Potter prescribed penicillin for her bronchitis. He also wrote two prescriptions for quaalude when she complained that she was having difficulty sleeping. He told her to have the prescriptions filled at different pharmacies.[5]

Campbell testified that after her bronchitis had subsided she again visited Dr. Potter at his office. She again requested quaalude. Potter then asked her to perform fellatio on him and while the sexual act was being performed, he wrote a prescription for quaalude. On several subsequent visits Potter prescribed both quaalude and other controlled substances. Campbell testified that on two occasions she again engaged in oral sex at the doctor's request and each time received double prescriptions. Often when Dr. Potter wrote double prescriptions he wrote one in the name of "Dawn Campbell" and the other in the name of "Marie Campbell".

Sheri Cosner, a 22 year old prostitute, testified that she visited appellant's office several times between 1975 and 1977 and received prescriptions for controlled substances. She testified that during several visits she performed oral sex for appellant at his request and at the same time received prescriptions for drugs. On one of these occasions, she and her girl friend performed oral sex for him together. She testified that the doctor would use different names when writing more than one prescription and that she told him that she was giving some of the drugs to her friends.

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[5] A doctor's suggestion that prescriptions be taken to different drugstores and not filled at the same one is a significant factor in proving that the doctor was not acting for a legitimate medical purpose and in the usual course of his professional practice. Law enforcement agencies check drugstores for prescriptions issued on controlled substances. A doctor, to avoid suspicion, may attempt to limit the number of prescriptions to be filled at each drugstore. See *United States* v. *Larson*, 507 F.2d 385, 387-88 (9 Cir. 1974); *United States* v. *Bartee*, 479 F.2d 484, 489 (10 Cir. 1973).

Karen Ribeiro, a female undercover agent with the Nevada State Division of Investigation and Narcotics, testified that she first visited appellant on August 12, 1977, after an audit revealed that he had been writing an inordinate amount of prescriptions for quaalude. After a brief medical examination, Ribeiro told the doctor that she and her boy friend needed quaalude for their social activity. He wrote her prescriptions for quaalude, preludin and dexedrine, although she stated she had no medical difficulties.

Ribeiro testified that on a second visit two weeks later appellant stated that he wasn't sure of her. "He was leery of me, stating that State Narcotics had come to his office earlier and they may be using women now." He still wrote her prescriptions. On a third visit on October 13, 1977, he stated that "the State Narcotics had just arrested Dr. Russell for prescribing too many quaalude, so he had to be careful." Nevertheless he wrote prescriptions for her for quaalude and for her "boy friend" for preludin, using the name of Jill Bogart, and a third prescription for Ribeiro for dexedrine, using her middle name. He cautioned her to take the prescriptions to different pharmacies.

Dr. Matthew J. Ellenhorn, who qualified as an expert in the fields of medicine and pharmacology, testified for the Government regarding the controlled substances and standards of medical care and practice in prescribing them. In response to hypothetical questions, he testified that, with little exception, the testimony of the Government witnesses indicated no legitimate medical purpose for the many prescriptions for quaalude.

Dr. Potter testified in his defense that he had never had sexual relations with anyone in his office and denied all allegations of improper conduct in the examination and treatment of the Government witnesses.

Contentions on Appeal

Appellant contends that the trial court erred in (1) permitting testimony that the defendant had sexual relations with his patients, (2) failing to give a proper limiting instruction on the evidence of the sexual relations, and (3) allowing testimony concerning the arrest of another doctor for illegally prescribing controlled substances; and (4) that improprieties in the Government's closing argument deprived him of a fair trial.

I. Evidence of Sexual Conduct

Appellant contends that testimony concerning repeated occurrences of oral sex in his office with the various Government witnesses should have been excluded as irrelevant under Fed. R. Evid. 404(b), and even if relevant, as unfairly prejudicial under Rule 403. We disagree.

Rule 404(b) provides:

> (b) Other crimes, wrongs, or acts.—Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Here the evidence was not offered to impugn character, as appellant argues, but rather to prove motive and lack of good faith intent in failing to comply with usual "professional practices" and "legitimate medical purposes".

Rule 404(b) is "one of inclusion which admits evidence of other crimes or acts relevant to an issue in the trial, except where it tends to prove *only* criminal disposition". *United States* v. *Rocha,* 553 F.2d 615, 616 (9 Cir. 1977). This "inclusionary rule", however, is subject to the balanc-

ing test of Rule 403.[6] *United States* v. *Sangrey,* 586 F.2d 1312, 1314 (9 Cir. 1978).

The record contains substantial evidence that there was often no legitimate medical purpose for appellant's dispensing of controlled substances. The motive for his prescribing the controlled substances was unclear. From the evidence that the doctor engaged in sexual activities with his patients simultaneously with the writing of prescriptions the jury could properly infer that the granting of sexual favors provided at least some incentive for his actions. It was not necessary, as appellant argues, for the Government to prove that the issuance of the prescriptions was conditioned upon the granting of sexual favors. It was sufficient that the sexual favors provided an inducement to prescribe controlled substances without legitimate medical purpose.[7] The sexual acts were clearly connected with the illegal transactions.

The evidence of sexual conduct was also relevant to an element of the crime: the defendant's lack of good faith in

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[6] Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[7] Moreover, while there is no evidence that the issuance of prescriptions was conditioned upon sexual favors, Sheri Cosner did testify that several times there was no charge for her "visits" to the doctor's office "Because I gave the doctor head." (Tr. p. 204)

Campbell testified that when she requested a prescription for quaalude on her first visit, appellant told her that quaalude was good for sex and gave her a second prescription for her boy friend. (Tr. p. 130-31) After she performed fellatio upon appellant on her second visit, he wrote her a second prescription. (Tr. p. 134-35)

medically treating his patients. The trial court, at the defendant's request, instructed the jury as follows:

> A controlled substance is prescribed by a physician in the course of his professional practice, and therefore lawfully, if the substance is prescribed by him in good faith in medically treating a patient.
>
> In order to determine whether or not a prescription or prescriptions were issued in the course of a defendant physician's professional practice, you may consider *all the evidence of circumstances surrounding the prescribing of the substance in question,* the statements of the parties to the prescription transaction, any expert testimony as to what is the usual course of medical practice, *and any other competent evidence bearing on the purpose for which the substances in question were prescribed.* (emphasis added).
>
> Unless you find beyond a reasonable doubt that the act of prescribing charged in the indictment was not done for a legitimate medical purpose in the usual course of professional practice, then you should find the Defendant not guilty.[8]

The evidence of sexual activities between the doctor and his patients at the time that he prescribed the substances in question was "competent evidence bearing on the purpose for which the substances . . . were prescribed". The evidence was relevant and admissible to determine whether or not the prescriptions were issued in the course of the doctor's "professional practice" and "prescribed by him in good faith in medically treating a patient".

Evidence relevant under Rule 404(b), however, must be "excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . . "Rule 403. In *United States* v. *Sangrey, supra,* we refused "to require a mechani-

[8] The instruction was taken verbatim from an instruction approved in *United States* v. *Green,* 511 F.2d 1062, 1071 (7 Cir. 1975).

cal recitation of Rule 403's formula on the record as a prerequisite to admitting evidence under Rule 404(b)," and concluded that the demands of Rule 403 are met if it "appears from the record as a whole that the trial judge adequately weighed the probative value and prejudicial effect of proffered evidence". 586 F.2d at 1315.

It is true, as appellant argues, that the trial judge did not articulate the balancing of the probative value of the evidence with its possible prejudicial effect. It may be noted, however, that no objection was made when Dawn Campbell testified that she performed sexual favors for the doctor; nor was there any objection when Sheri Cosner first testified concerning her sexual experiences with the doctor. It was not until the prosecution began to develop testimony that Cosner and her girl friend visited the doctor and performed sexual acts for him together, that any objection was interposed.[9] Although this objection preserved the defend-

[9] In a bench conference when Cosner was called as a witness, appellant's counsel referred to a statement she had made to officers and her testimony before the Grand Jury and stated that "the witness should be restricted to items that are in the indictment." Government counsel indicated that they intended "to offer evidence of a prolonged relationship with this defendant . . . to show the intent and motive". The court stated that the defendant could make his objection "at the appropriate time" and that the Government was entitled to show acts to establish intent or motive and that the "relationship with any particular witness of this sort with the doctor is totally relevant".

Counsel for appellant made no objection until Government counsel started to interrogate Cosner regarding "what happened" when she and her girl friend entered the doctor's office. Appellant's counsel then said, "I'm going to object, I am familiar with what the purpose of the Government is and I am going to object on the grounds that it serves nothing but to prejudice the Defendant here and it doesn't tend to prove or disprove anything of the issues made by the Indictment." No request was made for oral argument or for balancing under Rule 403. The objection was overruled without comment.

ant's right on appeal for all similar evidence subsequently introduced,[10] it did not affect the admissibility of evidence previously admitted without objection. This evidence could properly be considered by the jury under appropriate instructions.[11]

We cannot say that under the circumstances of this case the failure of the trial judge to formally articulate the balancing test constituted reversible error. Obviously the testimony was prejudicial to the defendant, but it was relevant on issues of motive and whether the prescriptions were made "in the usual course of professional practice" and "for a legitimate medical purpose".[12] The trial judge expressly ruled at a bench conference (see Note 9) that the testimony was relevant, even though he did not expressly articulate the balancing test. It is clear from our own evaluation of the record that the probative value of the relevant evidence was not "substantially outweighed by the danger of unfair prejudice". (Rule 403) Any error of the trial judge in failing, *sua sponte,* to set forth the reasons for his ruling did not "affect substantial rights" of the defendant and may be disregarded. Fed R. Crim. P. 52(a).

II. Limiting Instruction

When evidence is admitted under Rule 404(b), the trial court "should ordinarily instruct the jury carefully as to the limited purpose for which the evidence is admitted." *United States* v. *Sangrey, supra,* 588 F.2d at 1314. If the defendant does not request a limiting instruction, however, the failure

[10] See, *e.g., Evalt* v. *United States,* 359 F.2d 534 (9 Cir. 1966).

[11] The admission of the testimony of Campbell and Cosner prior to the objection was not "plain error" under F.R. Crim. P. 52(b).

[12] Moreover, there was no other evidence having more probative value on these issues, but involving less likelihood of prejudice. *Cf. Eichel* v. *New York Central R.R. Co.,* 375 U.S. 253 (1963).

of the court to give the instruction does not necessarily result in reversible error. *Id.* "Should the court give such an instruction, either on request or on its own motion, the court must be careful to instruct the jury correctly as to the limited purpose for which the evidence is admitted." *United States* v. *Back,* 588 F.2d 1283, 1287 (9 Cir. 1979).[13]

No limiting instruction was requested by appellant. The court, however, gave the following instruction *sua sponte*:

> The defendant is not on trial for any act of conduct of his that is not charged in the indictment. The defendant is not on trial for having sexual relations with patients. You should consider the evidence of sexual relations, if you believe it took place, only to determine whether or not the defendant is guilty of the unlawful distribution of controlled substances as charged in the indictment.

Appellant did not object to the instruction or request any modification.[14] He contends on appeal that giving the instructions was "plain error". He argues that the instruction did not properly limit the manner in which the jury would consider the evidence concerning appellant's sexual relations and "served to enhance the possibility that the verdict would be premised on the belief that the defendant was 'unsavory' and a 'bad person'."

The Government recognizes "that the instruction could have been more carefully drawn to delineate the manner in which the jury could consider the evidence of sexual relations." It contends, however, that in the context of the

[13] An improper limiting instruction may even enhance prejudice to a point where unfair prejudice outweighs probative value. *Id.* at 1287.

[14] Apparently this instruction was not discussed with counsel at a conference on suggested instructions prior to oral argument and was added by the court without conferring with counsel.

instructions as a whole, the instruction could not have misled the jury, was not prejudicial to appellant, and accordingly did not constitute plain error. We agree.

In the limiting instruction itself the court expressly cautioned the jury that the defendant was "not on trial for any act or conduct of his not charged in the indictment" nor "for having sexual relations with his patients". Rather should the jury believe that the sexual acts took place, it could consider this evidence "only to determine whether or not the defendant is guilty of the unlawful distribution of controlled substances as charged in the indictment."

The court gave the special instruction offered by the defendant, which we have quoted above, that in determining whether the prescriptions "were issued for a legitimate medical purpose in the course of a defendant's medical practice", the jury may consider "all of the evidence of circumstances surrounding the prescribing of the substances in question" and any "competent evidence bearing on the purpose for which the substances in question were prescribed." The court emphasized, by repeating it, the concluding paragraph that the jury should find the defendant not guilty unless it found "beyond a reasonable doubt that the act of prescribing charged in the indictment was not done for a legitimate medical purpose in the usual course of professional practice." Other instructions covered fully the essential elements of the offense. The jury was also properly instructed that the "motive of the accused is immaterial except insofar as evidence of motive may aid you in determining his state of mind or intent. . . . You may infer the defendant's intent from all the surrounding circumstances in the case."

Instructions are not to be read in isolation. "The question is whether the complete package was misleading or represented a statement inadequate to guide the jury's delibera-

tions." *United States* v. *Elksnis,* 528 F.2d 236, 238 (9 Cir. 1975) (citing *United States* v. *Park,* 421 U.S. 658, 673-676 (1975)). Viewing the instructions as a whole, we cannot say that the jury was misled by the court's limiting instruction. It is clear that the evidence of sexual relations, as well as other evidence, was to be considered in determining whether appellant was acting in "the usual course of professional practice" and "for a legitimate medical purpose" in treating patients Campbell and Cosner. The giving of the limiting instruction was not plain error.

III. Testimony Concerning Dr. Russell

Dawn Campbell testified that prior to seeing appellant she had been getting quaalude prescriptions from a Dr. Russell, but decided to stop seeing him when she heard he had been arrested. Agent Ribeiro testified that when she visited appellant on October 13, 1977, he told her that he had to limit his quaalude prescriptions to her, stating that state narcotics agents had just arrested Dr. Russell for prescribing too many quaaludes. Appellant testified on cross-examination that he did not remember this conversation with Agent Ribeiro. Upon further questioning he stated that he did not know Dr. Russell, but that sometime in 1977 he heard that Dr. Russell had been indicted.

Appellant contends that (1) the Government's only purpose in introducing this evidence was to attempt to obtain a conviction through guilt by association; and (2) the trial court erred in failing to weigh its probative value against prejudicial effect, as required by Rule 403. We find no merit in either contention.

(a) Testimony of Agent Ribeiro and Dr. Potter.

No objection was made to the Government's questioning of Agent Ribeiro or Dr. Potter. The admission of this

testimony clearly was not "plain error". The "plain error" of Rule 52(b) is invoked only in "exceptional situations" where it is necessary "to prevent miscarriage of justice or to preserve the integrity and reputation of the judicial process". *United States* v. *Larson, supra,* 507 F.2d at 387 (quoting *Marshall* v. *United States,* 409 F.2d 925, 927 (9 Cir. 1969)).

In any event, the evidence was relevant to the question of appellant's good faith in issuing the prescriptions and consciousness of guilt. In *United States* v. *Bartee, supra,* the defendant, a physician, was convicted of dispensing controlled substances in violation of 21 U.S.C. § 841(a). He had written prescriptions to a police agent who had posed as one of his patients. In holding that the totality of the evidence supported the inference that the defendant "was not acting for a legitimate medical purpose and such was not within the usual course of his professional practice," the court stated that, "Perhaps the most damning evidentiary matter was the testimony by agent Coller that Dr. Bartee said that he had to be careful since the BNDD (Bureau of Narcotics and Dangerous Drugs) checked the drugstores for prescriptions issued. . . ." 479 F.2d at 489 We quoted this language with approval in *United States* v. *Larson, supra,* 507 F.2d at 387, where we considered the sufficiency of the evidence to sustain the conviction of a physician for violation of 21 U.S.C. § 841(a).

Agent Ribeiro's testimony that appellant told her he would have to be careful because Dr. Russell had recently been arrested is analogous to the testimony in *Bartee.* In both cases the testimony indicated that the doctors were taking precautionary measures to prevent law enforcement agencies from learning of their actions. This evidence was clearly relevant. It was also proper for the Government

on cross-examination to question appellant concerning his conversation with agent Ribeiro.

Nor is there merit in appellant's contention that the court erred in failing *sua sponte* to make articulate a balancing test under Rule 403. The evidence concerning Dr. Russell did not involve evidence of other crimes or wrongful acts of appellant, admitted under Rule 404(b). If any balancing were required, it is clear that the probative value of this evidence sufficiently outweighed any prejudicial effect.

(b) Testimony of Dawn Campbell

An objection was made to Dawn Campbell's testimony that she came to Dr. Potter for quaalude when she learned that Dr. Russell had been arrested. The relevancy of this testimony is questionable. Later, however, agent Ribeiro testified, without objection, that after ascertaining from drugstore checks that Campbell had obtained prescriptions from both Dr. Russell and Dr. Potter, she interviewed Campbell to find out her reason for doing so. Particularly in view of the subsequent testimony regarding Dr. Russell, it is clear that any error in admitting Campbell's testimony did not "affect the substantial rights of the defendant" (Rule 52(a)) and was harmless beyond a reasonable doubt.

IV. Impropriety of Government's Closing Argument

Appellant contends that "the Government's closing argument, taken as a whole, deprived him of a fair trial", in that the prosecutor (1) appealed to the emotions and prejudice of the jurors by emphasizing the evidence of sexual activities; (2) interjected his personal belief concerning the issues of guilt and credibility of witnesses; (3) contained inflamatory and improper attacks on appellant's character; and (4) improperly referred to the failure of appellant to call certain witnesses and to produce certain documents.

With one exception, appellant did not object to any of the statements of which he now complains. He must, therefore, demonstrate plain error as to the other statements. F.R. Crim. P. 52(a).

This court has held repeatedly that "improprieties in counsels' arguments to the jury do not require a new trial unless they are so gross as probably to prejudice the defendant, and the prejudice has not been neutralized by the trial judge." *United States* v. *Parker,* 549 F.2d 1217, 1222 (9 Cir.), *cert. denied,* 430 U.S. 971 (1977); *United States* v. *Rich,* 580 F.2d 929, 936 (9 Cir.), *cert. denied,* 439 U.S. 935, 99 S.Ct. 330 (1978); *United States* v. *Mikka,* 586 F.2d 152, 155 (9 Cir. 1978), *cert. denied,* 440 U.S. 921, 99 S.Ct. 1247 (1979). As we noted in *Rich,* "Counsel are necessarily permitted a degree of latitude in the presentation of their closing summations."

We find no merit in the contention that through the reference to sexual activities the Government appealed to the emotions and prejudices of the jury rather than proving the elements of the charges. The references to the alleged sexual activities were not excessive when the prosecution arguments are viewed as a whole.[15] The prosecutor made it clear that the evidence relating to sexual activities should be considered only in determining motive and purpose. The essential elements of the offense were properly stated by both the court and prosecutor, and the prosecutor emphasized that the question in each count was whether that "specific prescription was written in a good faith effort to treat a patient for a legitimate medical purpose". The court and prosecutor both clearly and properly informed the jury that their verdict must be based only on the charges in the indictment. We find no plain error in the

[15] As the Government has noted, the references to sexual activities appear on only eight of the 49 pages of the transcript covering the closing arguments.

prosecutor's argument relating to appellant's sexual activities.

It is true, as appellant argues, that there were instances where the prosecutor improperly interjected his own opinion and commented on factual matters not in the record. During his argument he commented on Sheri Cosner as follows:

> It is quite apparent, I think, to everybody here that this is a girl that is not only accustomed to the usage of dangerous drugs, but it appears to me, based on observation, and it is your observation that counts, of course, that in light of her testimony that she still uses quaaludes to this day.

The prosecutor also argued that "Dawn Campbell's problem may be . . . and I suspect they revolved . . . around the use of drugs."

Probably the most questionable comment was the prosecutor's argument in rebuttal that it was "not an unusual prosecution function" to promise not to prosecute a witness "who gives important testimony against an individual, who in the eyes of the Government has committed far more serious crimes. . . ." This comment, however, was in response to the argument of appellant's counsel that Dawn Campbell and Sheri Cosner might have a motive in giving damaging testimony since they "were given immunity from anything that might be involved in return for their testimony in this particular case."

We cannot say that these comments of the prosecutor were "so gross as probably to prejudice the defendant". In any event, any prejudice that may have resulted was "neutralized" by the court's instructions and the prosecutor's own comment: "I want to remind you once again . . . that the statements of counsel are not to be considered by you as evidence. Nothing I say is evidence . . . if I

should make a misstatement . . . if I incorrectly state what in my view a witness said, my recollection doesn't count, it's your recollection that counts." See *United States* v. *Rich, supra,* 580 F.2d at 936.

Appellant complains that the prosecutor in rebuttal argued that the Government witnesses were "telling the truth" and that the defendant's testimony was "inherently incredible". We recognize that "[i]t is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or the guilt of the defendant." American Bar Association Standards relating to the Administration of Criminal Justice, The Prosecution Function § 5.8(b). The prosecutor's argument, however, must be viewed in the context of the argument of appellant's counsel questioning the credibility of the Government's witnesses, including his comments with respect to agent Ribeiro that, "I'm not going to tell you that Miss Ribeiro was a fabricator or a liar"; but counsel was unable to "accept her testimony as being really credible."

In view of the sharp conflict between the testimony of the doctor and the key Government witnesses, the question of credibility was obviously important. Both counsel recognized that the issue of credibility must be decided by the jury. Viewing the argument as a whole with the court's instructions, we conclude that any prejudice in the prosecutor's argument was neutralized and, in any event, did not constitute plain error.[16]

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[16] The defendant's failure to object is, of course, a factor to be considered. As we stated in *White* v. *United States,* 315 F.2d 113, 116 (9 Cir), *cert. denied,* 375 U.S. 821 (1963).

> [E]ven if there had been a taint of unfairness or prejudice (in argument), no voice was raised in protest—no objection ever raised—no chance given the trial court to cure any alleged error. This is a complete waiver.

Appellant complains further of the statement in the prosecutor's argument that, "If a doctor writes a prescription in bad faith . . . causing a dangerous drug to be delivered to somebody, he is no different from a street pusher", and counsel's reference to appellant as "neither self-respecting, honorable [nor] competent". These remarks were made in discussing the evidence in the case, and again no objection was made. These remarks clearly did not constitute plain error requiring a reversal. See, *e.g.*, *United States* v. *Taxe*, 540 F.2d 961, 968 (9 Cir. 1976), *cert. denied*, 429 U.S. 1040, *reh. denied*, 429 U.S. 1124 (1977).

Finally, appellant questions the propriety of the prosecutor's argument that appellant failed to produce certain witnesses and documents. Both sides agree that comment on the failure to produce evidence is permissible only when the evidence is peculiarly available to the opposing party. See *Forsberg* v. *United States*, 351 F.2d 242, 249 (9 Cir.), *cert. denied*, 383 U.S. 950 (1965); 2 Wigmore § 285 (3d ed. 1940).

The prosecutor commented on the defendant's failure to call his nurse as a witness and suggested that she did not appear for fear that testimony in support of the doctor would be perjury. A "potential witness must be equally available both legally and practically". *Kean* v. *C.I.R.*, 469 F.2d 1183, 1188 (9 Cir. 1972). In *Samish* v. *United States*, 223 F.2d 358 (9 Cir. 1955), we held that comment was permissible where the defendant failed to call his "faithful secretary" as a witness, noting that to say she "was equally available to both sides is to ignore plain facts". *Id.* at 365. A similar situation is presented here. See also *United States* v. *Beekman*, 155 F.2d 580 (2 Cir. 1946). The Government's suggestion that the nurse would have perjured herself had she testified was improper. We cannot find, however, that this was plain error requiring a reversal.[17]

[17] Defendant also contends that it was improper for the prosecutor to comment on the defendant's failure to call an unnamed psychia-

The only objection to the prosecutor's argument was made when he commented on the failure of the doctor to produce the records of the Government's witnesses. The objection was on the ground that the defendant "would not be permitted, absent consent of a patient, to introduce the chart and medical record of the patient". The Government argued that in testifying concerning their relationship with the doctor, there was an implicit waiver of any privilege. The court commented, "Well, let's go on to another matter." Even assuming that the medical records would have been privileged, this reference was harmless error in view of the overwhelming evidence of guilt.

While the prosecutor's closing argument contained some improprieties,[18] we are satisfied from our reading of the entire argument of both parties that the improprieties were not purposeful or flagrant. Read in isolation some may appear prejudicial, but read in the context of the entire argument and the court's instructions to the jury, any prejudice was neutralized and did not affect the substantial rights of the accused. The evidence against appellant was substantial, and the jury obviously accepted the testimony of the Government's witnesses.

Affirmed.

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trist who treated Cosner and who, according to the defendant, recommended continued "quaalude treatment" for her. The defendant did not object to this argument at trial, however, and we find no plain error.

[18] While we have concluded that any improprieties in the Government's closing argument do not require a reversal in this case, we again admonish Government counsel, as we did in *United States* v. *Mikka, supra,* 586 F.2d at 155, n. 6 and cases there cited, to observe recognized standards in their closing argument. See, *e.g.,* American Bar Association Standards, The Prosecution Function, § 5.8, Argument to the Jury.